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IN THE

Supreme Court of the United States

October Term, 1966

No. 936

HONORABLE THURMOND CLARKE, Chief Judge, United States District Court, Central District of California,

Petitioner,

vs.

WILLIAM G. YAX,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on October 26, 1966.

Citations to Opinions Below.

No opinion other than the Judgment of the Court of Appeals issuing the writ of mandamus was filed. The Order to Show Cause and the Judgment of the Court of Appeals are printed in Appendix A, *infra,* pp. 1-2.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 26, 1966. Rehearing was denied on December 6, 1966. The Order is printed in Appendix A, pp. 3-5. The jurisdiction of this Court is invoked under 28 U.S.C., §1254.

Questions Presented.

1. Whether the Court of Appeals has the power and jurisdiction under 28 U.S.C. §1651 to remove a United States District Judge from the trial of a case which has been regularly assigned to him for trial and where no motion to disqualify said District Judge has been made as required by 28 U.S.C., §144 and the issue of removal is presented for the first time to the Court of Appeals during oral argument by plaintiff's counsel and without notice to the District Judge and without compliance with 28 U.S.C., §144, in the District Court.

2. Whether plaintiff was entitled as a matter of constitutional right to a jury trial prior to the trial by the Court of issues of law and where it thereupon further appeared that there were jury questions of fact to be tried as provided in Rule 39a(2) Federal Rules of Civil Procedure.

Statutes Involved.

The statutory provisions involved are Title 28 U.S.C., §144, Title 28 U.S.C., §1651, the Seventh Amendment to the United States Constitution, Rule 39a(2), Federal Rules of Civil Procedure. They are printed in Appendix B, *infra,* pp. 7-8.

Statement.

The action of *Yax v. Polaroid,* No. 64-1064-TC, United States District Court, Southern District of California, Central Division, which is a diversity case, is one, as characterized, by the plaintiff Yax "for breach of contract either as an express contract arising from the existence of correspondence between plaintiff and the defendant or an implied in fact contract coming

from the conduct of the parties." (Petition for Writ of Mandamus, p. 3, lines 2-5.)

The procedure followed by Chief Judge Clarke in *Yax v. Polaroid* is in keeping with the traditionally and historically sound concept of allowing the court to determine issues of law.

The primary issue in *Yax v. Polaroid* is whether correspondence between the parties constitutes a contract. If a contract was not formed by the correspondence, that is the end of the case, for no implied-in-fact contract can exist as a matter of law in the face of an express declaration against it.

If a contract was created by the correspondence, then the issue of damages would be determined by a jury.

If the court should find there was no express direct declaration against an implied-in-fact contract, then the remaining issues should be determined by a jury.

The Respondent, Chief Judge Clarke, had entered no Order of any kind or made any statement or decision as to whether there was or was not a contract between the parties, as he was restrained from reaching a decision by the Order to Show Cause which was served on Judge Clarke why a Writ of Mandamus should not be issued, and pending the final disposition of the Petition for Mandamus by the Court of Appeals, Judge Clarke was stayed from rendering his opinion in the case and further stayed from entering judgment therein until the further Order of the Court of Appeals; hence no opinion of Judge Clarke was rendered and no judgment was entered by him so there is nothing in the record to indicate what his opinion or order or judgment would have been had he not been restrained from proceeding further.

The Petitioner, Honorable Thurmond Clarke, is the Chief Judge of the United States District Court, Central District of California. Judge Clarke is a veteran jurist with an enviable background of judicial experience, having served on the Superior Court of California, for the County of Los Angeles, from 1935 to 1955 when Judge Clarke was appointed United States District Judge by President Eisenhower. The case at bench is the third time that a panel of three judges of the Court of Appeals for the Ninth Circuit have unconstitutionally and illegally removed Chief Judge Clarke as the trial Judge in a case which had been regularly assigned to his Court for trial, pursuant to the rules of the United States District Court, Central District of California. However, the *Yax* case is the only case in which Judge Clarke was made a party respondent and in the *Yax* case he is the *sole party* that is named as respondent. The other two cases referred to are *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F. 2d 804 and *Cord v. Smith*, 338 F. 2d 516. In both of the above-mentioned cases, Judge Duniway appears to have written the opinion for the panel. In the *Yax* case, Judge Duniway was a member of the panel which also included Judges Barnes and Ely. The Mandamus-Judgment Opinion in the *Yax* case does not bear the name of which judge on the panel is the author thereof. In order to accomplish the summary removal of Chief Judge Clarke as the trial Judge in the *Yax* case, the aforementioned panel of the Court of Appeals improvidently invoked Title 28, U.S.C. §1651 by issuing the extraordinary Writ of Mandamus. No other United States Court of Appeals or the United States Supreme Court, in any case which has been brought to the attention of Petitioner has followed this unorthodox and

unconstitutional procedure which has been adopted by the Court of Appeals for the Ninth Circuit. There is no justification or authority for any Court of Appeals to negate Title 28, U.S.C., §144 and to ignore the plain mandate of the law as provided in said section. No motion whatever was made at the hearing before Chief Judge Clarke by counsel for the plaintiff Yax, the Respondent herein, to disqualify Chief Judge Clarke. Neither did said plaintiff, the Respondent herein, raise the disqualification issue in his Petition for a Writ of Mandamus. It was not until the argument took place before the panel of the Court of Appeals on October 3, 1966, that counsel for the plaintiff Yax, the Respondent herein, for the first time orally requested said panel to remove Chief Judge Clarke from the case and to direct Chief Judge Clarke to tranfer the case to another District Judge. Such procedure is unprecedented, unorthodox and highly improper and completely by-passes the requirements laid down in Title 28 U.S.C., §144. No Court has the right to repudiate, set aside, or nullify the plain mandate of any statute adopted by the Congress of the United States which has not been declared unconstitutional. Such unconstitutional procedure denies the trial Judge the right to defend himself and is in violation of his constitutional rights to due process of law. It is understood that this usurpation of judicial power by said panel of the Court of Appeals for the Ninth Circuit is based upon the case of *LaBuy v. Howes Leather Company*, 252 U.S. 249, where this Court stated:

> "We believe that the supervisory control of the District Courts by the Courts of Appeals is necessary to proper judiciary administration in the Federal system."

However, in the *LaBuy* case, Judge LaBuy was not summarily removed as the trial Judge, or at all, by the Supreme Court nor has there been any other published decision of the Supreme Court which empowers or authorizes the Court of Appeals to summarily remove a trial Judge from presiding at the trial of a case in the absence of a proper motion being made in the District Court, pursuant to Title 28 U.S.C., §144. The *La Buy* case involved the appointment by Judge LaBuy of masters to take evidence in complicated anti-trust cases, which were pending before Judge LaBuy, and the obvious purpose and judicial effect of the decision by the Supreme Court in the *LaBuy* case was a direction to Judge LaBuy that he should go to work himself and that he was not to delegate his judicial duties to court appointed masters. The judgment of the said panel of the Court of Appeals in the case at bench is an unauthorized usurpation of judicial power and said order is beyond the jurisdiction of the Court of Appeals on the record before said Court in this proceeding. Not only is said peremptory removal of Chief Judge Clarke as trial Judge in said *Yax* case embarrassing and humiliating to him but this unconstitutional procedure also demeans Chief Judge Clarke and detracts from his dignity and prestige as Chief Judge among the bar, litigants, and his brethern on the bench. The unorthodox and summary removal by the Court of Appeals of a respected and honorable judge from trying a case that is before him without granting to that Judge the opportunity and right of every citizen to have his day in court and to be confronted with a motion and an affidavit and a certificate of counsel which alleges facts and not conclusions of law and which show the disqualification of such Judge to sit as the trial Judge as required by

28 U.S.C., §144 is drastic unconstitutional procedure which should not become a precedent with the approval of this honorable Supreme Court.

The case of *Yax v. Polaroid,* No. 21271, was set for jury trial on September 13, 1966, at 10:00 A.M. before Chief Judge Thurmond Clarke. Judge Clarke took the bench in his Courtroom at approximately 9:45 A.M. on the morning of September 13, 1966, to call the jury roll as a jury panel had been ordered by Chief Judge Clarke for the trial of the *Yax* case. No jurors were present in the Courtroom or available for jury service. The Court was not in session. Judge Clarke observed that Mr. Carr, attorney for the plaintiff in the *Yax* case was in the Courtroom but that counsel for the defendants had not arrived. Chief Judge Clarke thereupon informally outlined to Mr. Carr the difficulties that the Court was having in obtaining jurors for the trial of jury cases. There are twelve United States District Judges in the Central District of California, of which Judge Clarke is the Chief Judge, and three Senior Judges. The judicial districts in California were rearranged by an act of Congress which became effective on September 19, 1966. A new district was created in San Diego and a new district was created to replace the Southern District of California and to be known as the Central District of California. The term of the jury panel had expired on September 9, 1966, and a new jury could not be impaneled until after September 19, 1966, under instructions received from the Department of Justice in Washington, D.C. Although an Order had been made by Chief Judge Clarke to hold jurors over during said interim period, the jurors who had already served their term of duty did not respond

to the call and the Courts were unable to obtain a sufficient number of jurors from which a jury could be impaneled. It was this problem that Judge Clarke was explaining to Mr. Carr and which obviously had nothing to do whatever with the right of Mr. Carr's client to have a jury trial of the issues of fact that were triable under Rule 39a(2) F.R.C.P. before a jury, should it develop that such issues of fact existed. As above stated, said discussion was entirely informal and was carried on during the absence of the attorneys for the defendant and when the Court was not in session. Notwithstanding, that the transcript clearly discloses that said statement of Chief Judge Clarke, with reference to the jury problem, had nothing whatever to do with the plaintiff's case, the mandamus judgment of the Court of Appeals in removing Judge Clarke as the trial Judge is based upon said informal statement. The footnote at the bottom of page 1 of said mandamus judgment provides the ground for the issuance of the Writ of Mandamus and is as follows:

> "The Court stated: It is getting awfully hard to get jurors to come down here because of the fact there is no parking provided for them, whereas the County gives them more money and the County gives them parking."

It is highly improper and unfair to fasten this deleted colloquy statement on Judge Clarke as providing the ground upon which Judge Clarke is allegedly disqualified to remain as the trial Judge in said *Yax* case.

It clearly appears from the record [Rep. Tr. pp. 22-23] that counsel for the defendant Polaroid made it clear to the District Court that the issues to be determined constituted solely one of law to be decided

by the court in proceeding without a jury. In this connection, it was stated:

> "Mr. Johnston, we are ready to proceed. The case was noticed for trial on this date. We have three witnesses here, four witnesses, I beg your pardon, from Cambridge, Massachusetts, who have come out here especially for this case.
>
> "Again I urge on the court that this is a case that revolves around what certain correspondence means, whether that correspondence constitutes a contract. In our view, it does not, but this is an issue for the Court."

On page 17 in the Opposition to Writ of Mandamus, it was emphasized in conclusion:

> "If there are factual issues remaining after the determination of the issues of law above referred to, respondent will present those issues to a jury."

It was defendant's position that the issue whether correspondence between parties created a contract or whether a declaration against a contract exists so as to preclude the existence of a contract were questions of law for the Court to determine preliminarily before any issue of fact may arise. It is manifest that these issues are questions of law subject to being determined solely by the Court pursuant to Rule 39a(2), Federal Rules of Civil Procedure. Therefore, the ruling by the Respondent herein, Chief Judge Clarke, was in no way inconsistent with either the Seventh Amendment to the United States Constitution or with the case law guaranteeing a jury trial of issues of fact and a court trial of questions of law.

The only ruling that may be ascribed to Petitioner Chief Judge Clarke was worded as follows:

> "The Court: All right, I stretched it a little beyond the 10:30 for you. I gave you a few minutes, but we will go ahead and *try the contractual issue now.* So you may call your first witness." (Emphasis added.) [Rep. Tr. p. 30, lines 19-22.]

Petitioner Chief Judge Clarke did *not* rule that "the action be tried without a jury," but only ordered that the *contractual* issues be determined which falls within the express authorization of F.R.C.P. Rule 39a(2). The Court of Appeals enumerates at page "1" of its judgment three grounds asserted to be reasons for Petitioner Chief Judge Clarke's ruling. Item "C" of this list it is respectfully submitted should not properly be considered or accepted as a basis for predicating that the Petitioner Chief Judge Clarke concluded that the action should be tried without a jury or as a ruling of Petitioner Chief Judge Clarke to this effect. The informal remark of Chief Judge Clarke noted in the footnote of the Judgment of the Court of Appeals on page "1" was clearly a portion of a preliminary informal colloquy that took place between Petitioner Chief Judge Clark and Mr. Carr, counsel for the plaintiff Yax, prior to the arrival of counsel for the defendant Polaroid Corp. in the Courtroom. There had been no opportunity for a ruling on any issue and no motion had been in fact tendered. The admitted fact that this remark was made prior to the arrival of defendant's counsel is clearly shown by the sentence [Rep. Tr. p. 16] following the portion of

the informal remark quoted in Note "1" on page one of the Judgment of the Court of Appeals. The full statement of Chief Judge Clarke was as follows:

> "It is getting awfully hard to get jurors to come down here because of the fact that there is no parking provided for them, whereas the County gives them more money and the County gives them parking. . . .

and then the Court of Appeals deletes the remaining part of Chief Judge Clarke's statement which was as follows: "I just mention that, although I don't see Mr. Tackabury." (Mr. Tackabury was co-counsel with Mr. Johnston for the defendant Polaroid Corp. and had not arrived in the Courtroom.) Also, on page 17 of the Reporter's Transcript the following appears:

> "The Court: Yes. Well, we will get a jury on the 21st, but on the 20th we have to have a medicare case.
>
> Mr. Johnston, yes, I know you are from Mr. Tackabury's office. I will have to repeat to you—*just come right in*—what we said because we have been unable to get a jury." (Emphasis added.)

Counsel for Respondent, Chief Judge Clarke in the Petition filed with the Court of Appeals for a re-hearing respectfully submitted to the Court of Appeals that in the light of the foregoing, the informal colloquy (quoted in footnote (1) page 1 of the Judgment of the Court of Appeals issuing the Writ of Mandamus) which was solely between Chief Judge Clarke and plaintiff's counsel *dehors*, the presence of counsel for the defendant

Polaroid should be *obliterated* out of common decency and respect to Chief Judge Clarke from the Judgment of the Court of Appeals. If the requested deletion was made, the statement contained on page 1 of the Judgment of the Court of Appeals that Petitioner Chief Judge Clarke proceeded without a jury because "the impaneling of a jury was inconvenient" would find no support in the record. The Court of Appeals summarily denied the Petition of Chief Judge Clarke for re-hearing, and consequently no deletion was made in said Judgment as requested.

Reasons for Granting the Writ.

1. In tracing the history of the decisions of this honorable Court as well as those of the Courts of Appeals in the ten judicial circuits of the United States concerning the "power" of the Courts of Appeals to remove a District Judge and to direct said District Judge to transfer a case which is pending before said Judge, we start with *Connelly v. United States District Court,* 191 F. 2d 692 (C.A. 9).

Two decisions in the Ninth Circuit which antedate *Connelly,* namely, *Price v. Johnston,* 125 F. 2d 806 and *Loew's, Inc. v. Cole,* 185 F. 2d 641 (C.A. 9), while involving attempted disqualifications of trial judges, do not pass upon the question of the power of the Court of Appeals in a mandamus or prohibition proceeding to recuse a judge.

In *Connelly* the District Judge, among other things, had made some observations indicating his antipathy toward communism. The petitioner had been indicated for the offense of conspiring to threaten and advocate the overthrow and destruction of the Government of the

United States. The petitioner filed with the respondent judge an affidavit pursuant to 28 U.S.C. §144.* The petitioner thereafter sought a writ of prohibition to disqualify the District Judge which was granted, Judge Denman writing the opinion with Judge Bone dissenting. In *Connelly,* as noted in footnote 1 at page 693 of 191 F. 2d the respondent judge did not question the power of the Court to issue the writ.

In *Gladstein v. McLaughlin,* 230 F. 2d 762 (C.A. 9), again involved another judge's views toward communism. The Court speaking through Judge Denman stated that while mandamus was a proper remedy the Court would not issue the writ which sought to prevent the District Judge from acting in proceedings for the disbarment of an attorney but did suggest that the judge take no further proceedings in the matter. Judge Pope in a concurring opinion, placing reliance on *Korer v. Hoffman,* 212 F. 2d 211 (C.A. 7), questioned the power of the Court to issue the writ. In *Gladstein* as in *Connelly,* an affidavit pursuant to 28 U.S.C. §144 had been filed in the lower court.

In the *Korer* case referred to by Judge Pope in *Gladstein,* the Court refused to issue a writ of man-

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*"§144. *Bias or prejudice of judge*

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

damus directing the disqualification of a Judge of a District Court and held that the petitioner's rights could be protected on appeal. In the concluding sentence of its opinion, the Court said, at page 215:

> "There is no case of which we are aware, and certainly none of the Supreme Court, which would authorize this court under the circumstances presented to issue the writ requested."

In *Albert v. United States District Court for W.D. of Mich.*, 283 F. 2d 61 (C.A. 6) (Cert. den. 365 U.S. 828), the Court held that mandamus was not a proper remedy to bring about the disqualification of a judge and in discussing the *Connelly, Gladstein* and *Korer* cases, said at page 62:

> "Mandamus has been held not to be the proper remedy to compel a judge to rescue himself. Green v. Murphy, 3 Cir., 1958, 259 F. 2d 591; Korer v. Hoffman, 7 Cir. 1954, 212 F. 2d 211, 45 A.L.R. 2d 930; Hurd v. Letts, 1945, 80 U.S. App. D.C. 233, 152 F. 2d 121.
>
> "In Connelly v. United States District Court, 9 Cir., 1951, 191 F. 2d 692, the Court issued a writ of prohibition, but the footnote on page 693 of the opinion indicates that no question was raised over its power to do so. This decision was followed in Gladstein v. McLaughlin, 9 Cir. 1955, 230 F. 2d 762 wherein the Court of Appeals felt it was unnecessary to issue the writ as the District Judge upon consideration of its opinion would refrain from proceeding further. In concurring, Circuit Judge Pope was of the view that the Court, in this same footnote in Connelly, had misconstrued the

language of Berger v. United States, 255 U.S. 22, 41 S. Ct. 230, 65 L.Ed. 481, which was that 'remedy by appeal [was] inadequate.' Id. 255 U.S. 36, 41 S. Ct. 234. In Korer v. Hoffman, supra, it was pointed out that what the Supreme Court in Berger was referring to was the efficacy of an appeal if the District Judge had been authorized to decide upon the truth of the facts set forth in the affidavit of bias and prejudice. In any event, Berger was not a mandamus case, but was an appeal from a judgement of conviction in a criminal case."

In *Hurd v. Letts,* 152 F. 2d 121 (C.A. D. of C.), cited in *Albert,* the Court refused to issue a writ to rescue a judge, again holding that appeal was the proper remedy.

In *Green v. Murphy,* 259 F. 2d 591 (C.A. 3), also cited in *Albert,* the Court in construing the All Writs Statute, 28 U.S.C. §1651, as limited its power refused to issue a writ to bring about the disqualification of a judge.

The *Connelly* case has been questioned in the *Albert* case, the *Green* case and by Judge Pope in *Gladstein.*

In all of the cases above cited which are mandamus or prohibition cases, an affidavit under 24 U.S.C. §144 was filed before the writ of mandamus or prohibition was sought.

In *Tanner Motor Livery, Ltd. v. Avis, Inc.,* 316 F. 2d 804 (C.A. 9) (Cert. denied 375 U.S. 821), the Court *on appeal* held it had the power to direct that the action be tried before another judge citing, at page

811, 28 U.S.C. §2106* and certain cases which we shall review briefly.

The first of these cases is *United States v. Ritter,* 273 F. 2d 30 (C.A. 10). In this case, the Court issued a writ to prevent respondent judge from further trying an action. However, there had been a previous motion before the respondent judge to disqualify himself.

The second case relied upon in *Tanner Motor Livery, Ltd.* is *Occidental Petroleum Corporation v. Chandler,* 303 F. 2d 55 (C.A. 10) (Cert. den. 372 U.S. 915). In the *Occidental Petroleum* case, a writ was issued to prevent the respondent judge from proceeding further. Again, in the *Occidental* case, an affidavit under 28 U.S.C. §144 had been filed.

The third case cited by Judge Duniway in *Tanner* is *United States v. United States District Court,* 209 F. 2d 575 (C.A. 6). This was not a disqualification case. A writ was issued to command a judge to try the case after a motion for change of venue had been granted.

The fourth and last case cited in the Court's opinion on this point in *Tanner* is *Gladstein,* which we have discussed *supra.*

In *Cord v. Smith,* 338 F. 2d 516 (C.A. 9), in an *appeal* from an order of the District Court, the Court ordered, without citation of authority, that further pro-

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*"§2106. *Determination*

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

ceeding in the District Court be transferred to another judge.

Berger v. United States, 255 U.S. 22, should be mentioned inasmuch as it has been cited rather frequently in opinions dealing with disqualification. In the *Berger* case, an affidavit to disqualify the trial judge had been filed and as stated in *Albert, supra,* page 63 of 283 F. 2d:

> "In any event, Berger was not a mandamus case, but was an appeal from a judgment of conviction in a criminal case."

2. The cases which we have reviewed herein, and there may be others, which touch upon the question, but because of the time element involved (The stay of the Mandate of the Court of Appeals is only for thirty days and expires on January 6, 1967.) we are not permitted to analyze, fall into the following categories:

a. Writ cases in which the writ was refused;

b. Writ cases in which the writ was granted:

(1) *In all of the cases which have come to our attention in which a writ was issued to disqualify the District Judge had previously been initiated in the District Court;*

c. Cases on appeal.

We have discovered no writ proceeding in which a writ was issued without there first having been an attempt to disqualify the judge in the Court below. The plaintiff in *Yax v. Polaroid* has not attempted to disqualify Judge Clarke pursuant to the procedure prescribed by 28 U.S.C. §144.

The mandamus proceeding before the Court of Appeals was not an appeal which distinguishes it from the *Tanner* and *Cord* cases referred to, *supra*. Furthermore, the Court of Appeals in both of the above-mentioned cases did not have the power or jurisdiction to remove Chief Judge Thurmond Clarke in either of said cases. Chief Judge Clarke was not a party Respondent in either of said cases, but he is the *sole party Respondent* in the case at bench.

Mandamus and prohibition are extraordinary remedies and are to be invoked only when other avenues of redress are not available. (*Ex parte Baldwin*, 291 U.S. 610, 614; *Ex parte American Steel Barrel Co.*, 230 U.S. 35.) In the *American Steel Barrel* case, the Court said at page 45:

> "The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy."

There is a prescribed method of seeking disqualification of a Judge of a District Court, to wit: 28 U.S.C. §144, which petitioner has not invoked. We submit that the Court of Appeals had no power to direct Chief Judge Clarke not to proceed in *Yax v. Polaroid* by reason of the fact that there has been no attempt to secure his disqualification in the Court below.

3. There has been a total lack of any showing of bias or prejudice by Chief Judge Clarke against the plaintiff Yax or in favor of the defendant Polaroid Corporation. The record is completely devoid of any basis for the Court of Appeals to have disqualified Chief Judge Clarke and doing so is tantamount to disqualifying any Judge simply because he is named as a

Respondent in a petition to the Court of Appeals seeking the issuance of a writ of mandamus.

4. A mistake of law does not justify the disqualification of a Judge. *Ex parte American Steel Barrel Co., supra; Beecher v. Federal Land Bank,* 153 F. 2d 987, 988 (C.A. 9) (Cert. den. 328 U.S. 871); *United States v. Shibley,* 112 Fed. Supp. 734, 748.

In the *American Steel Barrel* case, *supra,* the Court stated that adverse rulings were not a basis for disqualification of a Judge in the following language, page 43:

> "The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause."

It would serve no useful purpose to review or even cite all of the many cases dealing with the disqualification of Judges. Suffice is to say that what has transpired in *Yax v. Polaroid* does not even come close to establishing a basis for recusing Chief Judge Clarke and can constitute no more than a claimed error of law.

5. It is submitted that the Court of Appeals did not have the power to remove Chief Judge Clarke as the

trial Judge in the case of *Yax v. Polaroid* and to direct him to proceed no further for the reason that the plaintiff Yax had not sought to invoke the remedy available to him under 28 U.S.C. §144.

If Chief Judge Clarke were disqualified as held by the Court of Appeals, any litigant who claimed an error of law on the part of a judge could circumvent the provisions of 28 U.S.C. §144 by merely naming the judge as the Respondent in a mandamus or prohibition proceeding.

To even request the Petitioner, Chief Judge Clarke, to transfer the case of *Yax v. Polaroid* in the face of what has transpired is to impugn the integrity of Chief Judge Clarke despite the gratuitious statement in the Judgment of the Court of Appeals to the contrary.

6. The Seventh Amendment, as construed by the Courts, does not require in a jury trial that every issue, whether it be of law or of fact, be determined by a jury.

Baltimore & Co. Line v. Redman, 295 U.S. 654, 657;

Diederich v. American News Co., 128 F. 2d 144, 145 (10 C.A.);

Allen v. Biggs, 62 Fed. Supp. 229, 230 (D.C.E.D. Pa.).

In the first cited case the opinion of the Supreme Court contains the following language, page 657:

> "The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the

province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, *issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.*" (Emphasis added.)

The Federal Rules of Civil Procedure did not bring about a change in the law as above stated, for it is there recognized that in a jury trial some of the issues may be determined by the Court.

"Rule 39. *Trial by Jury or By the Court.*

(a) *By Jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless * * * (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LYNDOL L. YOUNG,
Counsel for Petitioner.

APPENDIX.

EXHIBIT A.

Order to Show Cause Why Writ of Mandamus Should Not Issue.

In the United States Court of Appeals, for the Ninth Circuit.

William G. Yax, Petitioner, vs. Thurmond Clarke, Respondent. No. 21271.

On consideration of the annexed petition of William G. Yax for a Writ of Mandamus against Thurmond Clarke, the respondent above named, the said petition for leave to file is hereby granted.

It is hereby ordered that Hon. Thurmond Clarke should show cause before this Court at 2 p.m. on the 3rd day of October, 1966, at the Court of Appeals Court Room, or as soon thereafter as counsel can be heard, why a Writ of Mandamus should not issue against him as prayed in such petition, and sufficient cause appearing therefor it is further ordered that in the meantime and pending the final disposition of said Petition for Mandamus by this Court the respondent be, and he hereby is, stayed from proceeding further in any manner with Civil Action No. 64-1064-TC, William G. Yax v. Polaroid Corporation, and that respondent shall not render his opinion in said case or, if said opinion has already been rendered, that said respondent shall not enter judgment in said case, until further order of this Court.

It is further ordered that service on or before the 16th day of September, 1966, of a copy of this Order to Show Cause, and a copy of the Petition for Writ of Mandamus, which petitioner has been granted leave to file, upon respondent Thurmond Clarke shall be deemed good and sufficient service thereof.

Dated Sept. 14, 1966.

/s/ Stanley M. Barnes
United States Circuit Judge

Order.

In the United States Court of Appeals, for the Ninth Circuit.

William G. Yax, Petitioner, vs. Thurmond Clarke, Respondent. No. 21,271.

Filed: Oct. 26, 1966.

Before: Barnes, Duniway and Ely, Circuit Judges.

Although timely demand had been made for a jury trial by petitioner here (plaintiff below) in a civil action entitled "William G. Yax v. Polaroid Corp.", No. 64-1064-TC, based on an alleged implied contract, after the denial of a motion for summary judgment on the ground issues of fact existed, the respondent district court judge ordered the *action* to be tried without a jury upon no expressed ground other than the fact that (a) defendant's witnesses were present and ready for trial; (b) that the defendant waived a jury; and (c) that the empaneling of a jury was inconvenient.[1]

In so ruling the trial court erred, and denied plaintiff below his constitutional right to a jury trial on an issue or issues of fact.

Plaintiff below sought of this court permission to file an order to show cause why a writ of mandamus should not issue against respondent, requiring the action to be tried before a jury.

A member of this panel issued the order to show cause and temporarily stayed further proceedings in the district court until the order to show cause could be heard and considered;

---

[1]The court stated: "It is getting awfully hard to get jurors to come down here because of the fact there is no parking provided for them, whereas the County gives them more money and the County gives them parking." (C.T. p. 16.)

The matter was heard by the undersigned panel on October 3, 1966, at which time it heard oral argument, and it was stipulated (a) that the briefs then on file could be considered the briefs on file for and in opposition to the petition for a writ of mandamus; (b) that each side could file briefs on or before October 18, 1966, limited to the one question of whether the district court judge should be directed or required to transfer the case to another judge of that court; and (c) that the temporary stay was to continue in effect until this court acted;

Said additional briefs having been duly filed and considered by this court, and the matter having been considered;

It Is Hereby Ordered (1) that the petitioner is entitled to have a trial by jury of the issues of fact raised by this action; subject to the ordinary Rules of Federal Procedure which may be hereafter invoked by either party;

(2) that the respondent Hon. Thurmond Clarke is permanently enjoined from further proceeding with the trial of this action in any way, other than as hereinbelow specified;

(3) that the respondent Hon. Thurmond Clarke is instructed and required to forthwith transfer the pending action of *William G. Yax v. Polaroid Corp.*, No. 64-1064-TC, to some other judge of the United States District Court for the Central District of California for all further proceedings, including the trial thereof.

This order for reassignment is in no sense a suggestion that impugns the character or judgment of respondent, the Hon. Thurmond Clarke, but is to avoid placing him in an awkward position; and so as to observe, not only the fact, but the appearance of granting to the litigants an impartial tribunal for the settlement of their differences.

/s/ Stanley W. Barnes
/s/ Walter Ely
/s/ Ben Duniway
United States Circuit Judges

A TRUE COPY
ATTEST Oct. 26, 1966
Wm. B. Luck, Clerk

In the United States Court of Appeals, for the Ninth Circuit.

William G. Yax, Petitioner, v. Honorable Thurmond Clarke, Respondent. No. 21,271.

Before: Barnes, Duniway and Ely, Circuit Judges.

Respondent's petition for rehearing en banc is hereby denied.

Stanley N. Barnes
Ben C. Duniway
Walter Ely
Circuit Judges

Filed: Dec. 6, 1966.
Wm. B. Luck, Clerk.

EXHIBIT B.

Rule 39 F.R.C.P.

Trial by Jury or by the Court.

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

28 U.S.C. § 144. Bias or prejudice of judge.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.

28 U.S.C. § 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. As amended May 24, 1949, c. 139, § 90, 63 Stat. 102.

Seventh Amendment to the United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

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IN THE

Supreme Court of the United States

October Term, 1966
No. 936

HONORABLE THURMOND CLARKE, Chief Judge, United States District Court, Central District of California,
Petitioner,

vs.

WILLIAM G. YAX,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

Questions Presented.

The Petition for Writ of Certiorari presents the question whether one has a constitutional right to trial by jury in an action for breach of contract. The Complaint in the court below includes a cause of action for breach of a contract implied-in-fact arising from the conduct of the parties and a further cause of action for breach of an express contract found in an exchange of correspondence and other documents. Also questioned by petitioner is the authority of the Court of Appeals to direct transfer of a case from one District Court judge to another other than through a proceeding instituted under 28 U.S.C. 144. Neither question is unique, none of the factors outlined in Rule 19 of this Court applies, and nothing is brought forth which requires resolution by this Court. Denial of the petition is in order.

Petitioner Improperly Denied Respondent His Constitutional Right to Jury Trial.

The controversy arose in the District Court in conjunction with respondent's suit against Polaroid Corporation for breach of contract. After removal by Polaroid from the state court, respondent made timely demand for a jury trial under Rules 38(b) and 81(c), Federal Rules of Civil Procedure, which was done particularly in view of the inherently numerous factual issues involved in an implied-in-fact contract, and the many factual determinations necessary in establishing the breach of the express contract that came about from the exchange of documents between the parties. The demand for jury trial was never waived. Nevertheless, petitioner arbitrarily denied this right to respondent on the date set for trial, ordering the case to proceed in its entirety without a jury. Respondent refused to proceed because of this invasion of his Constitutional right, whereupon Polaroid was allowed by petitioner to introduce certain documents into evidence and to present arguments to the court. Before petitioner rendered his decision, respondent filed a Petition for Writ of Mandamus under 28 U.S.C. 1651. It was imperative to proceed in this manner because of the amount of time that would have been necessary in an appeal, and the advanced years and ill health of the respondent. In view of the infirmities of the respondent, undue delays may well mean that he never is afforded his day in court. The Court of Appeals for the Ninth Circuit granted the petition, directing that respondent be granted a jury trial and that the case be assigned to another District Court judge.

The denial of the jury trial did not occur in the absence of counsel for the defendant, nor did it relate only to portions of the matters to be tried, as might be inferred from petitioner's brief. Instead, petitioner in open court, in the presence of Messrs. Johnston and Tackabury, attorneys for Polaroid, categorically stated that he would try all issues in the case without a jury, regardless of the repeated objections raised by respondent's counsel. The directive was expressed over and over by petitioner. The following are a few examples from the Reporter's Transcript of the Proceeding of petitioner's repeated assertions that he would proceed to try all issues without a jury [Tr. p. 22]:

> "Mr. Carr: What about the damages, Your Honor? That is an issue in the case.
>
> "The Court: Well, I will have to try everything. You are here. That is the only way I know to do.
>
> "Mr. Carr: Well, if we are entitled to a jury trial, why can't this matter be set over as you indicated originally?
>
> "The Court: Well, I would put it over to October 4th, but Mr. Johnston says he has his witnesses here and wants to proceed."

The Transcript continues, page 23:

> "The Court: I will order the matter to proceed without a jury. Counsel made the objection, you insist on a jury, and I will have to overrule the objection. We are here and ready and we will proceed."

Again, at page 27 of the Transcript:

> "The Court: Well, I have to try everything. I have to try everything."

Petitioner indicated that jurors were not at that moment available, but would be available in about two weeks. He denied a continuance of appropriate duration until jurors could be obtained (or even a continuance until the afternoon of the same day), instead directing that the matter proceed then and there. He went forth without a jury simply because defendant Polaroid did not wish to submit the case to a jury and wanted to go ahead without a jury at that time. On this ground, the respondent was denied his Constitutional right to a jury trial.

Denial of a jury trial clearly was improper because of the provisions of the Seventh Amendment to the Constitution, which states,

> "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved . . ."

This Constitutional provision is expressly noted in Rule 38(a), Federal Rules of Civil Procedure, which states,

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Respondent's action in the District Court manifestly is one at common law and is of a nature which has been triable by jury for a time long antedating the adoption of the Seventh Amendment to the Constitution. Consequently, when the jury trial had been demanded by respondent, and this demand never had been waived, petitioner acted improperly in refusing to permit respondent to have a trial by jury.

Petitioner has recognized that the case involved triable factual issues. This came from petitioner's denial of a Motion for Summary Judgment brought by defendant Polaroid Corporation. This motion was made after the pretrial record was complete, with discovery having been terminated and all depositions filed. When issues of material fact remain to be resolved, a motion for summary judgment should be denied.

Rule 56, Federal Rules of Civil Procedure.

Petitioner denied the motion that Polaroid Corporation had brought, thereby recognizing the presence of the factual matters in the case.

The transcript makes it clear that respondent was not proceeding with a trial of legal issues alone, to convene a jury later for resolution of remaining factual issues. Even if petitioner had been doing so, however, he would have acted improperly. It is not permissible to try an action piecemeal and in the absence of a jury for portions of the trial. That question unequivocally was laid to rest by this court in *Beacon Theaters v. Westover* (1959), 359 U.S. 500. There it was declared an abuse of discretion to order that portions of a trial would be conducted without a jury and others with a jury where the case was partially in law and partially in equity. When it is not appropriate under those circumstances, *a fortiori* it is improper in the present common law action where no equitable issues are present. Consequently, it is baseless to assert that respondent should not be accorded the jury trial he has demanded.

The Court of Appeals Correctly Ordered Transfer of Respondent's Case.

The Order of the Court of Appeals directing transfer to a different judge is nothing of particular consequence and clearly is within the authority of the Court of Appeals. No one is being deprived of any rights, and the court is merely saying that the respondent's case shall be heard before one judge instead of another. Each District Court judge has the same power as all the others, so the rights of both plaintiff and defendant are being preserved.

> *Castner v. First National Bank* (C.A. 9 1960), 278 F. 2d 376.

This is merely a precautionary move on the part of the Court of Appeals in order to make certain not only that respondent in fact receives an impartial trial, but also to preserve the appearance of justice so important in our system of law. As it was expressed in *Whitaker v. McLean* (C.A. D.C. 1941), 118 F. 2d 596.

> ". . . the courts of the United States 'shall not only be impartial to the controversies submitted to them but shall give assurance that they are impartial'; i.e., shall appear to be impartial. Berger v. United States, 255 U.S. 22, 34, 41 S.Ct. 230, 234, 65 L. Ed. 480 . . . a right to be tried by a judge who is reasonably free from bias is a fundamental right to a fair trial."

In a similar vein, the court stated in *Mitchell v. United States* (C.A. 10 1942), 126 F. 2d 550, 552, cert. den.

62 S. Ct. 1307, 316 U.S. 702, 86 L. Ed. 1771, rehearing den. 65 S. Ct. 855, 324 U.S. 889, 89 L. Ed. 1436,

> ". . . it is the duty of all courts . . . to guard against any appearance of personal bias or prejudice which might generate in the minds of the litigants a well-grounded belief that the presiding judge is for any reason personally biased against their case."

In *Long Beach Federal Savings & Loan v. Federal Home Loan Bank Board* (D.C. Cal. 1960), 189 Fed. Supp. 589, it was stated,

> ". . . the right to an impartial judge or quasi-judicial officer free from bias, prejudice, interest or other ground of disqualification is a fundamental right protected by the due-process clause of the Fifth Amendment, and thus a constitutional right . . ."

There are many factors present in the proceedings below which make transfer important and which mean that only when this is done will the case withstand critical scrutiny as an example of obvious neutrality. Petitioner was represented before the Court of Appeals by the same counsel who served for defendant Polaroid. Petitioner would be presiding over a case contested between counsel who have championed petitioner and counsel who have questioned his actions. At the hearing before the Court of Appeals, counsel for petitioner indicated that Polaroid (whom they also represent) probably would resubmit to the court the motion for summary judgment. Only by granting such a motion would petitioner substantiate the claim of his counsel that his ruling at the abortive trial was supposed to

be a segregation of legal issues for the court's determination alone, rather than an actual denial of a right to jury trial. Petitioner would be placed in an almost impossible situation if required to further conduct respondent's trial, one in which any man could scarcely prevent himself either from feeling motivations of retribution or from overcompensating and favoring petitioner at the expense of Polaroid. A strictly neutral trial requires that neither consideration should influence the outcome.

The Court of Appeals has exercised its power to transfer from one judge to another in other instances without challenge. In fact, twice before in reported decisions the same Court of Appeals has found it appropriate to direct assignment of cases away from this same petitioner.

Tanner Motor Livery, Ltd. v. Avis, Inc. (C.A. 9 1963), 316 F. 2d 804, cert. den. 375 U.S. 821;

Cord v. Smith (C.A. 9 1964), 338 F. 2d 516.

Now that it has occurred for the third time, petitioner has been prompted to file the petition for writ of certiorari. While it is quite understandable that petitioner may feel vexation upon the transfer of the case from his control, there is no effort whatsoever to criticize petitioner, and it is expressly recognized that he is a man of ability and high principles. As the Court of Appeals stated in its Order of October 26, 1966,

> "This order for reassignment is in no sense a suggestion that impugns the character or judgment of respondent, the Hon. Thurmond Clarke, but is to avoid placing him in an awkward position; and so

> as to observe, not only the fact, but the appearance of granting to the litigants an impartial tribunal for the settlement of their differences."

The authority of the Court of Appeals to effect the transfer arises not only under the all-writs statute, 28 U.S.C. 1651, but also may be found in 28 U.S.C. 2106 and the powers necessarily residing in a court of appellate level. As expressed in *United States v. Ritter* (C.A. 10 1959), 273 F. 2d 30, 32,

> "But we have no doubt of our power and inescapable duty to grant the relief sought, whether it be found in the all-writs statute or in the exercise of the inherent powers of appellate jurisdiction to effectuate what seems to us to be the manifest ends of justice. See LaBuy v. Howes Leather Co., supra."

In the *LaBuy* case, 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 290 (1956) this Court stated,

> "We believe that the supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."

The respondent is not bypassing 28 U.S.C. 144 in obtaining the order of the Court of Appeals as a result of the Petition for Writ of Mandamus. He merely is securing his relief through another route made virtually compulsory by his age and physical condition. There is nothing in 28 U.S.C. 144 to indicate that it is the only way to secure assignment from one judge

to another. Neither does 28 U.S.C. 144 purport to supplant or modify 28 U.S.C. 1651 or 28 U.S.C. 2106. On the contrary, the proper functioning of our judicial system requires that courts of appellate jurisdiction exercise the control exemplified in the proceedings that have taken place.

Conclusion.

Consequently, it is respectfully submitted that the respondent is constitutionally entitled to his trial by jury and that the Court of Appeals for the Ninth Circuit acted with complete propriety in directing the transfer to a different judge. Over a year has passed since the date respondent's case originally was scheduled for trial, with repeated delays occurring through no fault of respondent. A speedy resolution of this petition followed by a prompt trial of the issues between respondent and Polaroid is a necessity if respondent is to have an opportunity to litigate his grievance.

Denial of the Petition for Writ of Certiorari is respectfully requested.

Respectfully submitted,

MUNSON H. LANE,
GAUSEWITZ & CARR,
RICHARD F. CARR,
Counsel for Respondent.